IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF: JAKE JOSEPH MUSGA, Petitioner.	NO. 46987-1-II STATE'S SUPPLEMENTAL RESPONSE TO PERSONAL RESTRAINT PETITION

A. ISSUES PERTAINING TO DISCRETIONARY REVIEW

1. Does petitioner mistakenly challenge the trial court's unreviewable credibility findings and improperly ask this Court to replace them with his own?

2. Has petitioner wrongly challenged substantially supported findings with rejected arguments that are predicated on incorrectly reweighed evidence and discredited testimony?

B. STATUS OF PETITIONER

Petitioner is restrained pursuant to final judgment entered November 21, 2013, in Pierce County Cause No.13-1-01369-1. He pleaded guilty to the first degree rape and murder of a 2 year old boy—aggravated by the cruelty of those crimes, the excessiveness of the injuries and the vulnerability of that victim. Ex.65. The pleas were followed by a PRP alleging actual and substantial prejudice resulting from trial counsel's purported failure to:

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1. Adequately investigate his case and the State's evidence;
2. Adequately advise him regarding pleading guilty to murder; and
3. Adequately inform him regarding the consequences of his plea and the attending facts he admitted on the trial court's ability to impose an exceptional sentence.

The case was remanded for a reference hearing, with an order for findings that address:

1. Whether counsels' representation was deficient in one or more of the ways petitioner alleges with regard to his guilty pleas and/or his sentencing; and
2. If counsels' representation was deficient, whether the deficiency prejudiced petitioner with regard to his decision to plead guilty and/or his sentencing.

The trial court was not to consider claimed failures to provide discovery, counsels' handling of pre-sentence interviews, or time-barred claims of prosecutorial misconduct.

Credible evidence adduced at the reference hearing proves the crimes petitioner admitted committing came to police attention just after 4:00 a.m., March 30, 2013. Ex.20 p.12.[1] Officers responded to a 911 report of a heavily bruised toddler with breathing difficulties in an apartment lobby. *Id.* Visible portions of the toddler's forehead, face, chest, arms and legs were covered in too many bruises to count. *Id.* A treating physician diagnosed the toddler with non-accidental inner cranial bleeding in two locations, multiple areas of lung collapse, a large volume of blood in his abdomen, a damaged pancreas, a very high level of alcohol in his blood system and rectal bleeding consistent with sexual assault. Ex. 21 (p.16), 23 (p.27), 28 (p. 115), 39 (p. 124). The toddler, C.C., was pronounced dead at 7:50 a.m. *Id.* An autopsy revealed the death to be a homicide caused by blunt-force trauma to C.C.'s abdomen and head; his injuries included:

1. Acute blunt injuries of the head. A. Face and scalp bruises and abrasions. B. Superior frenulum laceration. C. Multiple subscalpular contusions. D. Acute brain injuries. i. Acute subdural hematomas. ii. Acute subarachnoid hemorrhages. iii. Focal traumatic axonal injury. iv. Cerebral edema and early hypoxic ischemic damage.

[1] Page numbers refer to bate stamp numbers at the bottom right of each page unless otherwise indicated.

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2. Acute blunt injuries of the abdomen. A. Torso bruises and abrasions. B. Mesentery laceration with hemoperitoneum, 800 milliliters.

3. Acute anorectal lacerations consistent with sexual assault. A. Full thickness anorectal mucosa tears. B. Circumferential anal mucosal hematoma. C. Deep perirectal hemorrhage.

4. Acute ethanol intoxication (0.11 g/dL).

5. Old blunt head injury, small subdural neomembrane.

6. Old blunt abdominal injury, mesenteric granulation and fibrosis.

Ex. 40 at 586.

The circumstances surrounding C.C.'s untimely death were revealed. His mother, Laura Colley, dated petitioner for 5 months. Ex.20 p. 12; Ex. 34 p. 315-16. Petitioner moved into an apartment with her and C.C. 3 months into the relationship. *Id.* Jobless, petitioner spent most days alone in the apartment with C.C. as Colley worked. Ex. 20 p. 12; Ex. 34 315-16; RP 423. Still, she was enthusiastic about his interest in her son. Ex.34 at 315. Petitioner admitted to telling a fellow inmate "he learned not to hit the kid in front of others." Ex. 46(p. 636); RP 465, 775-77, 835. This admission proved petitioner's pre-crime hostility for C.C. as well as provided an explanation for older bruising on his body. These facts were known to petitioner when he pled. *Id.*; Ex. 1-2, 9-10, 23 p.28. Petitioner conceded facts excluding the possibility of C.C.'s fatal and sexual assault injuries being inflicted before he was left alone with petitioner. RP 1272-89. His statements corroborate those made by C.C.'s mother and aunt. *Id.*; Ex. 26 p. 255. Colley left C.C. alone with petitioner near 7 p.m., Friday, March 29, 2013. Ex.34 p.315. She changed C.C.'s diaper with her sister right before leaving to spend the night with family in McCleary, WA. Ex. 34 p. 315, 337; Ex. 45 p.629-30. C.C.'s rectal area was not injured at the time, so the 7 used diapers police found in the apartment had yet to be filled with his blood. Ex. 11, 34 (p. 315, 337), 45 (p.629); RP 1272-89. Petitioner took C.C. to a park without incident

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after Colley left. RP 1279-89; Ex. 26 p.255. Petitioner wanted to buy marijuana. RP 287-88. Someone known to the Musgas reported seeing them outside. *Id.* Upon returning, petitioner claims he and C.C. showered naked together; after which, he dried C.C. off without incident. RP 1279-89; Ex. 26 p.255. C.C.'s rectum was not bleeding at that time. See *Id.*

Petitioner told police they spent the evening alone together before falling asleep together in the same bed. Ex.20 (p.13); 26 p. 255-260. Petitioner said he awoke to a thud, and found C.C. had fallen out of bed. *Id.* Petitioner said he ran C.C. downstairs since he was not breathing. *Id.* This is the story petitioner stuck with throughout his case. He told a new story at the reference hearing; wherein, he left the apartment and returned to find C.C. injured on the living-room floor, but inexplicably neglected to share that alibi with police or counsel. Ex.34 (p.315, 337), 45 (p.629-30); RP 415-17, 850-59, 864, 1493-94. This new story is internally inconsistent, for his stated reason for showering naked with a 2 year old boy, he only knew for a few months and did not feel comfortable disciplining, was that he did not feel safe leaving C.C. alone. Secreting such an alibi is also inconsistent with petitioner's new claim he wanted his defense thoroughly investigated for trial. *Id.* When asked whether C.C. consumed chemicals, petitioner said he may have snuck a sip of vodka—testing proved C.C. had acute ethanol intoxication of .11 g/dL; liquid in his bottle tested positive for ethanol. *Id.*; Ex. 40 (p. 586), 41, 43 p. 632, 646-47.

Karen Howard's apartment was directly beneath petitioner's unit. Ex. 28 (p. 116-17), 31 p.290-91. She heard "something [] being dropped or bounced around" in his unit from roughly 11:30 p.m. Friday, March 29th, to 1:30 a.m. Saturday, March 30th. *Id.* C.C. was 39 inches long and weighed 36 pounds. Ex.40 p. 587. Petitioner, a former football player, was about 6'2" and weighed 190 pounds. RP 453-55, 1480; Ex. 17. Howard heard "the baby screaming;" she knocked on petitioner's door, threatening to call police if the "fighting" noises continued. Ex. 31

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p.290-91. The baby's screams fell silent. *Id.* Petitioner never opened the door. *Id.* Yet his awareness of Howard's reaction accounts for why the story he first told had him waking to a thud C.C. produced by falling. Ex.20 p.13, 26 p. 255-260. At the reference hearing, petitioner abandoned that story in favor of adding his new account of leaving C.C. alone with Howard's comparison of the commotion she heard to adults fighting to conjure an unknown suspect that petitioner never mentioned to trial counsel. Ex.20 (p.13), 26 (p. 255-260), 31 (p. 290-91), 34 (p.315, 337), 45 (p.629-30); RP 415-17, 534, 850-59, 864, 1295-1300, 1493-94.

The 911 caller, Saldavia, spoke to police. He arrived at the apartment around 3:30 a.m. Ex.22 (p.20), 32 (p. 129-32). Petitioner ran into the lobby with C.C. *Id.* Although petitioner appeared to be crying when 911 responders were on scene, Saldavia was puzzled by petitioner's callousness once they left. *Id.* Saldavia elaborated in a recorded interview:

> [Petitioner] seemed concerned but [] more really concerned [sic] the kid was injured but more concerned [] someone was gonna find out [] kinda like a oh shit, I messed up [] he was more [] scared than worried [] scared for himself almost [].

Ex. 32 p.131-32. C.C.'s injuries were documented. Ex. 28 p. 115. Bruises extended around his body from the top of his head to his feet. *Id.*; Ex. 39 (p. 124), 9-10. His arms, ears and sides were cut. *Id.* His rectum was bruised and bleeding. *Id.*; Ex.38, 40. Petitioner attacked Saldavia at the reference hearing, but petitioner first described him as: "a really nice guy [who] took time out of his day to help." Ex.26 p. 260.

The apartment was forensically processed pursuant to a warrant. Ex.22 p.17. There were blood stains everywhere, *i.e.*, interior door, carpet, walls, bathroom door, toilet, blue blanket in the bathtub, bathtub, bath mat, bathroom counter, tissue from a bathroom garbage can, *pair of silver athletic shorts befitting an adult male*, child's blanket, baby wipes and diapers. Ex. 11-12, 18 (p. 226-40), 28 (p. 115-16). C.C.'s DNA was present in blood adhering to the blanket, wipes

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container, four carpet sections, shorts and counter. Ex.12. DNA testing did not reveal a profile for other contributors, including petitioner. The absence of semen combined with C.C.'s anal injuries to support an inference he was raped with an object. *Id.*; Ex. 40; RP 889. There was a bloody outline consistent with a toothbrush on the bathroom counter. Ex. 13.

C.C.'s anal injuries were sustained while he was alone with petitioner according to the corroborated timeline he adhered to before the reference hearing. So while the DNA results might have further inculpated him, they could not have logically exculpated him. Ex 12-13; 20 (p.13), 26 (p. 255-260), 31 (p. 290-9), 34 (p.315, 337), 45 (p.629-30); RP 415-17, 850-59, 864, 1295-1300, 1493-94. This is why the DNA results were not factored into the State's offer. RP 331, 336-37, 356-65, 378-92, 483-84, 525-27, 530-42, 877-78, 889. The trial court consistently found the DNA report "strengthened without weakening the State's case against petitioner." CP 40. At the reference hearing it was revealed that prior to the plea the defense retained a medical examiner from Oregon who confirmed C.C.'s injuries were probably inflicted during the period when petitioner and others put him alone with C.C. RP 462-64, 855-59; Ex.50. That finding was known to petitioner before the plea. *Id.* As was the inmate's verified revelation of petitioner's admission to secretly striking C.C. before the incident. RP 775-77.

So had petitioner let the offer deadline expire to await the DNA results, as he was free to do, he would have likely ensured exposure to aggravated murder in exchange for confirmation of a fact he already knew—the red substance that soaked diapers recovered from his apartment was C.C.s blood, as was the red substance adhering to the adult athletic shorts petitioner was likely wearing while changing those diapers. Ex. 12; RP 156-57, 483-84, 512-13, 530-42, 703, 775-77, 849. Even the defense attorney petitioner retained as an expert conceded the evidence proving petitioner's guilt for the original charges was "relatively strong." RP 1233-35, 1240-41,

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1244-45, 1261-64. That opinion was rendered without awareness of the defense-retained M.E.'s inculpatory finding and petitioner's verified admission to hitting C.C. *Id.* Those failings joined with the attorney's acceptance of petitioner's discredited story and hindsight evaluation of the evidence to make the attorney's testimony "unhelpful" to the trial court. CP 34, 41, 46; RP 491.

Hall filed a limited notice of appearance at the arraignment. Ex.5. Petitioner neglected to adduce a record of the hearing. Hall met with Homicide Chief Philip K. Sorensen, learned the State was unlikely to pursue the death penalty and shared that update with petitioner. RP 676-77, 869. Hall responsibly[2] sought Warner's help to ensure there were sufficient resources to represent petitioner well. RP 567, 647-48.

Warner was admitted to practice in 1989. His practice focuses on criminal law. RP 198-200. It has included about a half dozen murder cases. RP 200-01. He is death penalty qualified, and represented two aggravated murder defendants before petitioner's case. RP 202. Warner had handled sexual abuse cases with similarly injured children. RP 294-97. Hall had less experience, but had a 9 year criminal practice, including an attempted murder trial. RP 550-55. Their team was supported by licensed investigator David Snyder; Warner perceived him to be competent based on their work together at a King County public defense office. RP 461, 491. Their team was further supported by a paralegal. RP 461.

Warner and Hall commenced the representation reasonably projecting they would have at least a year to investigate the case before trial. CP 39; RP 629-30, 688-90. They planned to use that time to prepare in two stages—compile evidence and conduct interviews informed by that evidence. CP 39; RP 206-08, 210-11, 214, 217-18, 282-84, 303-04, 445-46, 451, 461, 468-

[2] RPC 1.1—Competence, Comment [1] "In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include [] whether it is feasible to [] associate [] with [] a lawyer of established competence in the field in question."

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72, 475-82, 497-98, 611-12, 621, 630-31, 688-89, 769; Ex. 52, 56, 58. They filed a detailed demand for discovery, then persistently pursued production. Ex. 7; 52, 53; RP 219, 300, 303-04, 475-82, 609. They contacted several pediatric-medical experts before retaining Oregon Deputy M.E. Nelson. RP 214-15. Available medical evidence was sought, so Nelson could review it for medical defenses. RP 450-51, 618, 855-56; Ex.50; CP 37.

Counsel obtained information about the incident from petitioner, and information about petitioner from his family while trying to obtain his treatment records for a diminished capacity defense or mitigation. RP 206, 411, 462-64, 468-70, 484, 617, 769, 775-77, 850-52; Ex. 49. Legal research was conducted. RP 489. Social media research led to Facebook evidence the Musgas took credit for discovering. RP 282-84, 445-46. Counsel's paralegal was to research the informant who disclosed petitioner's pre-incident mistreatment of C.C. RP 775-778, 834-35; Ex.57. A color-coded timeline of the incident was created to identify any inconsistencies. RP 207-08, 493-94 (color in original); Ex. 56. Investigator Snyder was to identify witnesses; he may have spoken with some, but formal interviews were not conducted. RP 208, 210, 496-98, 612-15, 621, 634; Ex. 58. Interviews were postponed to accumulate enough information to conduct them well. RP 619-23, 631; CP 39.

Counsel met with petitioner in jail for roughly 30 hours over 16 visits before the pleas. Ex.71. Counsel perceived the time to be sufficient given petitioner's intellect. RP 501, 596-97, 652, 850. The Musgas' expressed satisfaction with counsels' efforts on petitioner's behalf. RP 127-28. Those efforts included explanation of the charging document, elements, sentencing factors and their capacity to support an exceptional sentence. RP 292-93, 297-99, 651-53, 839-40, 842. Counsel cautioned petitioner against keeping discovery in his cell to protect him from those who attack charged child predators or might misuse it for personal gain. RP 400-02, 572-

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73. He followed that advice. RP 400-02. Counsel nevertheless informed petitioner of all the substantive evidence in discovery. RP 402-03, 411, 484, 505-06, 570-74, 580, 583, 587, 601-02, 633, 702-03, 849. He would not look at some autopsy photos. RP 403, 598. Proof of proper *Miranda* and warrant procedures made it likely the evidence against him would be admissible at trial. RP 304, 436, 440-41; Ex. 25, 29-30.

August 13, 2013, counsel was alerted of the State's plan to file an aggravated murder charge if petitioner did not communicate his intent to plead guilty to the originally filed charges by August 30, 2013. Ex. 52-A; RP 510-13, 607. Evidence shows that offer was promptly explained to petitioner. CP 12; RP 221, 474-75, 637; Ex. 71. Aggravated murder with its two potential sentences was explained in the context of the death penalty being an improbable result. RP 111, 154-55, 486-87, 524,652-53, 676, 690, 693-94. The Musgas' appreciated failure to plead may result in irrevocable exposure to an aggravated murder charge. RP 154-57. Counsel scheduled a meeting with the prosecutors to pursue more favorable terms. RP 342-43, 484-85, 523. The State would not budge due to the heinous nature of the crimes and strength of its case. RP 334-43, 363-67, 391-92, 484-87, 522-25, 530-34, 540, 542. Counsel believed they could obtain a continuance to prepare for trial if petitioner decided to forego a guaranteed opportunity to plead guilty to the original charges. RP 629, 689. The pros and cons of proceeding with pleas to the original charges versus proceeding to trial on those charges and aggravated murder were discussed with petitioner. RP 690. He wanted to plead guilty to the original charges rather than risk exposure to a sentence of mandatory life. RP 237-38, 690. It was this event—which counsel could not predict or control—that ended the reasonably planned pre-trial investigation. CP 38-39. Warner believed the evidence would enable the State to prove petitioner's guilt. RP 431-32. He could foresee a court accepting an amendment to aggravated murder, though he did not

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agree with the theory, and realized petitioner's fate would turn on the jury empaneled. RP 485-87, 510, 512-13. His decision to plead was relayed August 29, 2013, leaving him 10 more days to think about the plea before it was entered. Ex. 53, 62-64; RP 224, 269.

Both plea forms were explained to petitioner. RP 226, 228, 233, 239, 246-50, 258-64, 291-93, 297-99, 651-53. He knew they empowered the court to impose an exceptional sentence above the standard range. *Id.* Check marks appearing on the forms have no bearing on whether unchecked paragraphs were covered. RP 256, 258. Petitioner had no questions for counsel or the court. RP 229; 262. Petitioner assured the court he understood the pleas; at the reference hearing he claimed otherwise. Ex. 62; RP 1400-06. The court found his pleas to be knowingly, voluntarily and intelligently entered. Ex. 62-64. After the pleas, he made statements to his own expert as well as a DOC interviewer that showed he understood the pleas enabled him to seek a standard range sentence, which he desired, and enabled the State to seek a sentence above the standard range. RP 1378-79, 1507-09, 1529, 1540-41; Ex. 69 (p. 13); 85. He conveyed a desire to take responsibility for his crimes and remorse for what he did to C.C. *Id.* Those sentiments were consistent with his factual plea, where it was stated he:

> lost [his] temper after [C.C.] pee'd [sic] all over [him] when [he] was changing [C.C.'s] diaper so [he] picked [C.C.] up and slammed him into the floor. When [C.C.] would not stop crying [petitioner] put [his] finger into [C.C.'s] rectum [].

RP 1503-06, 1508-09; 1529, 1540-41; Ex. 62-64, 85. Petitioner criticizes Warner's intermittent inability to answer his PRP attorney's questions about review of discovery and the pleas, leaving out Warner was questioned about a 3 year old case by an attorney armed with the file Warner surrendered to her long before the hearing. *E.g.*, RP 218, 252-53, 706.

Petitioner claims his plea statements were haphazardly adopted lies, despite admitting they were the most important documents he ever signed. RP 1398, 1401-23, 1493-94. He and

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his mother also claim they lied or equivocated when they made the following remarks:

> **Petitioner's Mother**: Jake has talked to me about this every day for months [] Jake is taking full responsibility for C[.C.]'s death. He is extremely remorseful and saddened by his actions. Jake could have gone to trial and maybe gotten off on a technicality [] but he didn't. He did not want any of us to go through the pain that a trial would have caused all the families.

> **Petitioner**: I know [] there is no possible way to take back my actions that day. C[.C.] was an innocent life taken away [] I just want everyone to know how truly sorry I am. [] I accept full responsibility for my actions [] There is so much pain in my heart waking up and going through every day knowing what happened. It seems like a nightmare that never ends, and I know it must be worse for the family[].

Ex. 65 p. 41, 46-47; RP 159-65, 267-77, 1414-23, 1493-94. Their hindsight depreciation of the pleas was clarified at the reference hearing, and was showcased in an email to Hall:

> We are going to appeal [petitioner's] sentencing at some point. I just can't live with 50 years! I really never thought in a million years he would get 50 years. I though the worst would be 30. 50 years, we just – we should have went to trial. What is the difference between 50 – life and 60 – life? He is 19.

RP 166-67. Petitioner's mother uses "would," denoting disappointment, not "could," which would denote confusion about the court's authority to impose the sentence. Nowhere does she accuse counsel of failing to explain the possibility of a 50 year sentence. She admittedly applies hindsight reasoning that wrongly compares what she perceives to be the negligible difference between the exceptional sentence imposed and the life sentence they hoped to avoid, instead of properly comparing the standard range sentence it made possible against the one they hoped to avoid. The following exchange clarified the meaning of her email to Hall:

> **Q**: This is about the outcome of the sentencing, correct?
> **A**: Yes.
> **Q**: The point being made now in terms of the 50 versus the 60, is now, knowing the court imposed the 50 year sentence, there isn't much to lose by trying to go to trial?
> **A**: Correct. []

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Q: If he were to go to trial and [] the court decided to sentence him to an extra ten years after becoming more aware of the evidence, and he actually got 60 years to life, the difference between 50 and 60 doesn't make a lot of difference in terms of his lifespan, does it?

A: Correct. []

RP 167-69. She claimed knowledge of the truth would be lost, but then conceded:

Q: In hindsight, knowing what the court actually imposed, going to trial seems like the better idea?

A: Sure, yes.

RP 169-70. Similar reasoning resonated in petitioner's testimony:

Q: If you went to trial on Agg Murder and got a life sentence, you might end up with a sentence that is not much different than the one you have now, as compared to a 30-year sentence?"

A: That's possible, I guess.

RP 1394-96. Counsel reveals similar disappointment, but with professional acceptance of the fact pleas cannot be undone for hindsight dissatisfaction with the result; or as Hall put it:

> I think there is always room for improvement. If having known how this was going to turn out for Jake in terms of sentencing, I think we may have elected to proceed to trial and roll the dice on this case. We would have been able to do more investigation and such. I do think we could have done better, but I don't think there was a particular failing. Just in hindsight, there are always things that can be improved. []
>
> We were hoping for a sentence within the standard range, and it was a gamble. []
>
> [T]hey ultimately asked for [what] was higher than we wanted, but lower than life without parole. I don't think there was a possibility of a happy ending in this case, other than a win at trial. []

RP 687, 691, 693-94. He "was not surprised [by the outcome], but [] was disappointed." RP 694. He knew it "was within the realm of possibility," as did petitioner. RP 237-38, 249-50, 297-99694; 695, 1400-06, 1411-21, 1507, 1529; Ex. 62, 85. This is how petitioner's mother now characterizes her proclamation about petitioner's acceptance of responsibility and remorse:

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> **Q**: You say "appease the court." Really, based on what your testimony is now, your intent was to fool the court?
> **A**: If that's how you want to say it, yes. []
> **Q**: What you were describing, Ms. Musga, is that when you perceived your son was in need, you were willing to do whatever [] you could to help him, which includes writing a letter you did not believe to be true?
> **A**: Correct.

2RP 161. The only assurance against similar deceit going forward was what she described as her renewed faith in the system. *Id.*; CP 34. Contrary to the negative ways she and petitioner described counsel at the hearing, an email sent during the representation conveyed gratitude for their efforts on petitioner's behalf:

> Thank you so much for all you are doing for Jake. He really likes the both of you a lot. That helps calm my anxiety. He is a good kid and very appreciative.

RP 128.

C. ARGUMENT

Personal restraint procedure has origins in the State's habeas corpus remedy, guaranteed by art. 4, § 4, of the State Constitution. A PRP is not a substitute for an appeal. ***In re Pers. Restraint of Hagler***, 97 Wn.2d 818, 823-824, 650 P.2d 1103 (1982). Collateral relief undermines finality, degrades trial court proceedings and may deprive society the right to punish admitted offenders. *Id.*; ***In re Pers. Restraint of Woods***, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). These significant costs require collateral relief to be limited. *Id.*

Petitioner must prove constitutional error resulted in actual prejudice. Mere assertions are insufficient. ***In re Pers. Restraint of Riley***, 122, 772, 782, 863 P.2d 554 (1993). The rule constitutional errors must be proven harmless beyond a reasonable doubt has no application. ***In re Pers. Restraint of Mercer***, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); ***Hagler***, 97 Wn.2d at 825; ***Woods***, 154 Wn.2d 409. Petitioners must show a fundamental defect resulted in a

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complete miscarriage of justice to secure relief for alleged nonconstitutional error. ***In re Cook***, 114 Wn.2d 802, 812 792 P.2d 506 (1990); ***Woods***, 154 Wn.2d 409. This is a higher standard than actual prejudice. ***Cook***, at 810. Inferences must be drawn in favor of the judgment's validity. ***Hagler***, 97 Wn.2d at 825-826. This high threshold is necessary to preserve the integrity of trial court proceedings and recognizes petitioner had an opportunity to obtain judicial review by a preserved objection and appeal. ***Woods***, 154 Wn.2d at 409. Reviewing courts have three options in deciding PRPs:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;

2. If a petitioner makes a prima facie showing of actual prejudice, but the merits cannot be determined on the record, the court should remand for a hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;

3. If the court is convinced a petitioner has proven actual prejudice arising from constitutional error or a miscarriage of justice, the petition should be granted.

In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

1. PETITIONER INCORRECTLY CHALLENGES THE TRIAL COURT'S UNREVIEWABLE CREDIBILITY FINDINGS.

Credibility findings made by the trier of fact at a reference hearing cannot be reviewed, "even to the extent there may be other reasonable interpretations of the evidence." ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 679-80, 101 P.3d 1 (2004); ***In re Pers. Restraint of Gentry***, 137 Wn.2d 378, 411, 972 P.2d 1250 (1999). Contrary to petitioner's claims, credibility findings cannot be characterized as inaccurate. ***Gentry***, 137 Wn.2d at 411 (citing ***In re Pers. Restraint of Benn***, 134 Wn.2d 868, 910, 952 P.2d 116 (1998)). Trial courts evaluate demeanor to assess credibility. ***Gentry***, 137 Wn.2d at 411. Observed demeanor is key, for it includes expressions of countenance, motion, nervousness, coloration during critical examination, pace of speech and

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other non-verbal communication. ***In re Det. of Stout***, 159 Wn.2d 357, 383, 150 P.3d 86 (2007). All qualities absent from the cold record of a proceeding. *Id.*

Petitioner improperly asks this Court to replace the trial court's credibility findings with his own. How he could perceive himself to be a credible witness after claiming he lied to just about everyone involved in this case is bewildering. The same is so of his mother's testimony given her admitted willingness to lie in court to improperly influence outcomes perceived to be beneficial for her son. It is upon their shifting, self-serving accounts that Maybrown based his unhelpful hindsight criticism of counsels' conduct. Similar markers of unreliability were absent from testimony given by Warner and Hall. And the trial court had the advantage of perceiving each witness's demeanor while testifying. There is neither a legal basis nor factual justification for second guessing the trial court's credibility findings.

2. PETITIONER INCORRECTLY CHALLENGES THE COURT'S WELL-SUPPORTED FINDINGS WITH ARGUMENTS BASED ON REWEIGHED AND DISCREDITED EVIDENCE.

Precedent places "a heavy burden" on those hoping "to persuade [appellate courts] [a] trial court's assessment of conflicting evidence it heard [at] a reference hearing [i]s erroneous." ***Gentry***, 137 Wn.2d at 410. Review of a trial court's findings is limited to deciding if they are supported by substantial evidence. ***Davis***, 152 Wn.2d at 679. "Substantial evidence" is evidence of sufficient quality to persuade a fair-minded, rational person a declared premise is true. *Id.* at 679-80. Petitioner must prove a challenged finding lacks support. *Id.* "Conflicting evidence may [] be substantial, so long as [a] reasonable interpretation [] supports the [] findings." ***Gentry***, 137 Wn.2d at 411. When a reasonable interpretation is present, conflicting evidence will not be reweighed. ***State v. Arredondo***, 190 Wn.App. 512, 527, 360 P.3d 920 (2015) *rev. granted on other grounds*, 185 Wn.2d 1024, 369 P.3d 502 (2016). Unchallenged findings are verities. ***Davis***, 152 Wn.2d at 679.

Petitioner disagrees with just about each of the trial court's findings, *i.e*:

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Question No. 1 findings of no deficiency No. 1 and 2 (a)-(n);
Question No. 1 findings of no prejudice No. 1-6, and 8;
Question No. 2 findings of no deficiency No. 1-4, 7 [mislabeled 5]- 8;
Question No. 2 findings of no prejudice No. 1, 3-6 and 8 [mislabeled 4, but does not appear to address finding No. 8].

Most challenges are predicated on disagreement with unreviewable credibility findings. Many of his challenges treat as nonexistent testimony credited by the trial court, then argue against the associated finding from the illusory-evidentiary void created by that flawed approach. In this way, challenges to credibility findings are recast as challenges to substantive findings, *e.g.*:

Question No. 1, challenge to finding of no deficiency, p.67, predicated on discredited claim petitioner wanted to proceed to trial;
Question No. 1, challenge to finding of no deficiency, p.68, predicated on discredited claim counsel had no intention of doing anything for petitioner;
Question No. 1, challenge to finding of no deficiency, p. 73, predicated on discredited testimony counsel did not review all or most discovery with him;
Question No. 1, challenge to finding of no deficiency, p. 74, predicated on Musgas' discredited attempt to take credit for investigation counsel conducted;
Question No. 1, challenge to finding of no deficiency, p. 76, predicated on discredited claim petitioner was not alone with the victim when the fatal and rectal injuries were inflicted;
Question No. 1, challenge to finding of no prejudice, p. 79, predicated on discredited claim petitioner always wanted a trial.
Question No. 1, challenge to finding of no prejudice, p. 79, predicated on discredited testimony petitioner did not hit the victim.
Question No. 1, challenge to finding of no prejudice, p. 81, predicated on the discredited testimony of petitioner and his mother, accusing the victim's maternal relatives of being physically abusive toward and lacking devotion for the victim.
Question No. 1, challenge to finding of no prejudice, p. 82, predicated on discredited testimony counsel failed to explain the evidence, charges or pleas.
Question No. 2, challenge to finding of no deficiency, p. 83, predicated on discredited testimony the plea and its consequences were not explained;
Question No. 2, challenge to finding of no deficiency, p. 84, predicated on a rejection of credited testimony counsel informed petitioner of the defense-retained medical examiner's inculpatory findings before the plea;
Question No. 2, challenge to finding of no deficiency, p. 85, predicated on petitioner's discredited testimony fear of the death penalty coerced his pleas;
Question No. 2, challenge to finding of no deficiency, p. 85, predicate on discredited testimony the aggravating factors were not explained by counsel;
Question No. 2, challenge to finding of no deficiency, p. 86, predicated on discredited claim Warner is not credible;
Question No. 2, challenge to finding of no prejudice, p. 86, predicated on discredited claim counsel did not investigate the case;

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Question No. 2, challenge to finding of no prejudice, p. 86, predicated on discredited claim counsel failed to advise petitioner of the consequences for pleading guilty to the originally charged aggravating factors;
Question No. 2, challenge to finding of no prejudice, p. 87, predicated on accepting petitioner as a credible witness, which he was determined not to be;
Question No. 2, challenge to finding of no prejudice, p. 87, predicated on petitioner's discredited characterization of what he *really* meant when he accepted responsibility for his crimes and expressed remorse for them.
Question No. 2, challenge to finding of no prejudice, p.87-88, predicated on discredited claim counsel did not adequately explain the pleas.
Question No. 2, challenge to finding of no prejudice, pg. 88, predicated on discredited claim petitioner did not know his pleas authorized the court to impose an exceptional sentence above the standard range.
Presumably (although unnumbered) Question No.3, challenge to finding of no prejudice, p. 89, predicated on discredited claim trial counsel were not credible.
Question No. 3, challenge to finding of no prejudice, pg. 89, predicated on discredited testimony regarding petitioner's desire for a trial.

Question No.3's findings of no deficiency No. 1-5 are not challenged and are therefore verities. Pet.Sup.Br. p. 88-89. Unchallenged verities also appear in:

Question No. 1 finding of no prejudice No. 7;
Question No. 2 finding of no deficiency No. 5;
Question No. 2 finding of no prejudice No. 8; and
Question No. 3 findings of no deficiency No. 1-5.

Once the recast credibility findings are swept away, the remnant arguments reweigh evidence decided against petitioner, then recast conclusions he draws from that *recalibration* as support for his claims. They repetitively adhere to variants of these circular patterns:

Question No. 1 finding the investigation was not deficient

1. I don't think investigation credited by the court is investigation.
2. There was no investigation other than that which was credited.
3. Therefore, the finding of adequate investigation under the circumstances is unsupported by the record.

Question No. 1 finding of investigation was not prejudicial

1. It is prejudicial to enter pleas before completing investigation, *as I define it.*
2. My plea was entered before the completion of investigation, *as I define it.*
3. Therefore, finding an absence of investigation, *as I define it,* was devoid of prejudice is unsupported by the record.

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Question No.2 finding of no deficiency in informing plea to murder

1. Adequate counsel enables a defendant to make an informed decision whether to plead guilty to murder.
2. My discredited testimony is counsel failed to help me make an informed decision to plead guilty to murder, which should have prevailed over counsels' credited testimony and my guilty plea statements I was so informed.
3. Therefore, the finding counsel adequately enabled me to make an informed decision whether to plead guilty to murder is unsupported by the record.

Question No.2 finding of no prejudice in informing plea to murder

1. It is prejudicial to make an uninformed plea to murder.
2. My discredited testimony is my plea was uninformed, which should have prevailed of counsels' credited testimony and my plea statements I was informed.
3. Therefore, the finding that acceptance of my plea was devoid of prejudice is unsupported by the record.

Question No. 3 finding of adequate advice on the pleas' consequences

1. Adequate counsel explains the direct consequences of a plea.
2. My discredited testimony is counsel did not explain them, which should have prevailed over counsels' credited testimony and my plea colloquy that they were explained.
3. Therefore, the finding counsel adequately explained my plea is unsupported by the record.

Question No.3 finding of no prejudice in advice on consequences

1. It is prejudicial to plead not knowing the direct consequences.
2. My discredited testimony is I did not know them, which should have prevailed over counsels' credited testimony and my earlier statements that they were explained.
3. Therefore, the finding my plea was entered without prejudice due to my knowledge of its consequences is unsupported by the record.

76 exhibits were admitted through 11 witnesses. Only 3 witnesses testified favorably to petitioner's claims: petitioner, his mother and Maybrown. Their testimony was discredited as untrue or unhelpful. CP 33-34. Petitioner's investigator proffered inadmissible hearsay. CP 35; RP 971-84. Credible testimony was adduced through: Warner, Hall, Ausserer, Williams, Nist,

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Vold and Sofia; none of whom supported petitioner's claims. CP 33-35. A survey of that credible evidence reveals ample support for the trial court's detailed findings.

a. Factual findings on question No. 1: Petitioner's trial counsel adequately investigated his case and the State's evidence against him under circumstances presented by the State's offer with notice of pending amendment to aggravated murder.

Our Supreme Court has never held effective representation requires counsel to undertake independent investigation. ***State v. A.N.J.,*** 168 Wn.2d 91. 109, 225 P.3d 956 (2010). Counsel must reasonably investigate or reasonably decide against it. ***Strickland v. Washington***, 466 U.S. 668, 691, 104 S.Ct. 2052 (1984). Scrutiny of the choice is highly deferential. *Id.* For the investigation required, if any, varies according to each case. ***A.N.J.***, 168 Wn.2d at 111-12. Investigation can be reasonably cut short by an early decision to plead. ***State v. McCollum***, 88 Wn.App. 977, 982-83, 947 P.2d 1235 (1997). Meanwhile, counsel can prove ineffective for persuading defendants to forego favorable pre-trial resolutions in favor of trials that result in more severe sentences. ***Lafler v. Cooper***, 566 U.S. 156, 167-69, 132 S.Ct. 1376 (2012). A rule lamented by late Justice Scalia:

> Today [] the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, "it is the criminal justice system." Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and [] the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his constitutional entitlement to plea-bargain.
>
> I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house,

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> that is, to serve less time than the law says he deserves. And when the player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all [] the Supreme Court.

Cooper, 566 U.S. at 186 (Scalia, dissenting). Subscribe or not, it is law counsel must follow. The cross-current created by the variable duty to investigate and competing duty to preserve favorable options created by offers, the timing or extension of which cannot be controlled, can create, and here created, a "heads I win, tails you lose" proposition. *E.g.* ***State v. Imus***, 37 Wn.App. 170, 179, 679 P.2d 376 (1984). Had counsel acted as petitioner proposes and he found himself sentenced to life for aggravated murder, a PRP claiming petitioner proceeded to trial prejudicially unaware of the plea's foregone advantages would have likely followed.

Amid this cross-current, counsel reasonably responded to petitioner's probable exposure to an aggravated murder charge. Counsel could not control the timing of the State's notice, which arrived before pre-trial investigation was complete. But they were aware of the already persuasive case against petitioner, and that it had been corroborated by their own expert and verified statements petitioner made to a jail informant—a fact compromising their ability to call petitioner as a witness. *See* ***Matter of Kerr***, 86 Wn.2d 655, 663, 548 P.2d 297 (1976). Counsel was aware of the liberal allowance of pre-trial amendments, and the difficulty of overcoming the deferential standard applied to pre-trial evidentiary challenges. ***State v. Knapstad***, 107 Wn.2d 346, 356, 729 P.2d 48 (1986) (*prima facie* with all reasonable inferences drawn in favor of the State); ***State v. Freigang***, 115 Wn.App. 496, 507, 61 P.3d 343 (2002); ***State v. Hull***, 83 Wn.App. 786, 799, 924 P.2d 375 (1996); CrR 2.1(d); RP 431-32, 485-87, 510, 512-13.

Counsel's appraisal of the amended charge's viability was reasonable, for it required the State to prove petitioner murdered C.C. with premeditation—involving more than a moment of reflection, however short—to conceal a rape. RCW 9A.32.020, .030(1) (a); 10.95.020 (9),

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(11)(b); ***State v. Bingham***, 105 Wn.2d 820, 823, 719 P.2d 109 (1986). Those elements were foreseeably supported when all reasonable inferences are drawn from these facts:

> (i) healthy-vibrant toddler turns into a corpse under petitioner's exclusive care; (ii) sexual assault of toddler's rectum preceded death as evinced by blood pressure required for his severely lacerated rectum to fill 6 to 7 diapers with blood; (iii) toddler alive and screaming when downstairs neighbor alerted petitioner police would be called in response to screaming consistent with sexual injuries being inflicted on the living toddler at that time, (iv) screaming stops right after warning of police involvement is conveyed, supporting an inference death blows were administered after that warning to conceal evidence of the rape, (v) death caused by multiple blows inflicted by an adult male against a toddler, who would not need to be incapacitated by weapons or ambush, and which caused acute brain injuries, lacerations to the stomach and pancreas as well as rectal lacerations consistent with sexual assault, and (vi) moment of reflection between Howard's warning and each of multiple blows; (vii) proof petitioner previously assaulted the toddler, revealing pre-incident animosity as motive, (viii) absence of semen in deep anal-wound track combined with bloody outline of toothbrush on bathroom counter supports inference of penetration with end of toothbrush used as a weapon under the circumstances.

A survey of similar child murders supports this reasoning. *E.g.*, ***Curtis v. State***, 93 Nev. 504, 568 P.2d 583 (1977); ***State v. Gee***, 28 Utah 2d 96, 498 P.2d 662 (1972); *see also*, ***Gentry***, 125 Wn.2d at 603-04 (1995); ***State v. Lord***, 125 Wn.2d at 912 (1995); ***State v. Robtoy***, 98 Wn.2d at 30 (1982) (*abrogated other grounds*, ***State v. Radcliffe***, 164 Wn.2d 900 (2008)); ***State v. Scott***, 72 Wn.App. at 216 (1993); ***State v. Sargent***, 40 Wn.App. at 352-53 (1985). Counsel likewise pragmatically predicted the possibility of conviction. RP 431-32, 485-87, 510, 512-13.

Competent counsel need not pursue futile or risky strategies, particularly when the cost of doing so might be irreversible exposure to a life sentence once the dust of pre-trial litigation settled. Had counsel acted according to petitioner's hindsight prescriptions, they would have foreseeably put him on the wrong side of a deadline for pleading guilty to his original charges. ***Lafler***, 566 U.S. at 168; ***State v. James***, 108 Wn.2d 483, 484-89, 739 P.2d 699 (1987); ***State v. Brown***, 159 Wn.App. 336, 371, 245 P.3d 776 (2011); ***State v. Trickler***, 106 Wn.App. 727, 731-

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32, 25 P.3d 445 (2001); ***Anderson v. United States***, 393 F.3d 749, 754 (8th Cir. 2004). This is the lens through which the findings should be reviewed. CP 35-42. More support appears at:

> RP 156-57, 202, 206-08, 210-11, 214-15, 217-19, 282-84, 287-88, 294-97, 300, 303-04, 331, 336-37, 356-65, 378-92, 411, 415-17, 423, 445-46, 450-51, 453-55, 461-65, 468-72, 475-84, 489,491, 493-94, 496-98, 512-13, 525-27, 530-42, 567, 609, 611-15, 618-23, 629-31, 634, 647-48, 676-77, 688-90, 703, 769, 775-78, 834-55, 849-59, 864, 869, 877-78, 889, 889, 1233-35, 1240-41, 1244-45, 1261-64, 1272-89,1295-1300, 1480, 1493-94; Ex. 1-3, 5, 7, 9-13, 17, 18 p. 226-40, 20 p.12-13;Ex. 21 p.16; Ex.22 (p.20), 23 (p.27-28); 26 (p. 255-60); 28 (p. 115-17), 31 (p.290-91), 32 (p. 129-32), 34 (p. 315-16), 337; 38, 39 (p. 124),40 (p.586-87); 41, 43 (p. 632, 646-47). 45 (p. 629-30), 46 (p. 636), 49-50, 52, 53, 56-58.

The challenged investigation is not comparable to ***A.N.J.***, where before pleading a 12 year old to a sex offense, counsel spent as little as 55 minutes with the child, did no independent investigation, consulted no experts and did not evaluate the evidence. *Id.* at 102. Those failures aggregated amid a problematic scheme for indigent defense funding to result in a rare exception limited to its facts. *See Id.* at 117, 124. Whereas petitioner's counsel secured the opinion of a medical expert, pursued treatment records for defenses, reviewed the discovery with petitioner over the course of 30 hours and took other steps that make petitioner's comparison of his case to ***Hinton*** equally unsound. ***Hinton v. Alabama***, __ U.S.___, 134 S.Ct. 1081 (2014) (failure to retain expert) (citing ***Kimmelman v. Morrison***, 477 U.S. 365, 385, 1006 S.Ct. 2574 (1986) (failure to pursue discovery)). Petitioner's claims wrongly rely on other ineffective assistance cases that proceeded to *trial* absent reasonable preparation, which fundamentally differs from investigations cut short by pleas. *E.g.* ***State v. Jones***, 183 Wn.2d 327, 330, 352 P.3d 776 (2015). Petitioner likewise failed to prove prejudice, being without new evidence capable of logically affecting the pleas, alleged idiosyncratic significance assigned to facts immaterial to his identity as the one who raped and murdered C.C. aside. *See* ***Hill v. Lockhart***, 474 U.S. 52, 60, 106 S.Ct. 366 (1985). All of which leaves petitioner without facts or law to support his claims.

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b. Factual findings on question No. 2: Petitioner's trial counsel adequately advised him regarding the pros and cons of pleading guilty to first degree murder.

Petitioner was required to prove counsel failed to substantially assist him in deciding whether to plead guilty and the failure prejudicially caused the plea. ***In re Pers. Restraint of Cross***, 180 Wn.2d 664, 706, 327 P.3d 660 (2014) (citing ***McCullum***, 88 Wn.App. at 982-83); ***State v. Osborne***, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); ***In re Pers. Restraint of Peters***, 50 Wn.App. 702, 703, 750 P.2d 643 (1988). Substantial assistance occurs when counsel helps the defendant evaluate the evidence and explains a plea's consequences, so an informed decision on whether to plead can be made. *Id.*; ***In re Pers. Restraint of McCready***, 100 Wn.App. 259, 263, 996 P.2d 658 (2000); ***State v. Malik***, 37 Wn.App. 414, 416, 680 P.2d 770 (1984). This requires explanation of the evidence and its likelihood of leading to conviction. ***A.N.J.*** 168 Wn.2d at 109, 111; ***Hill***, 474 U.S. at 57-58. Deficient performance must be proved by more than self-serving allegations. ***Connick***, 144 Wn.2d at 451; ***Osborne***, 102 Wn.2d at 97. Competent performance does not turn on whether a plea is knowingly and voluntary entered. ***Lafler***, 566 U.S. at 173.

Detailed findings explain why petitioner failed to prove his plea was the prejudicial product of deficient advice. Risks and benefits of trial were explained. As reflected by his allocution, as well as his statements to counsel, Muscatel and Sofia, petitioner was aware of his guilt—a condition that would make him rationally apprehensive about submitting his case to a jury and himself to the publicity, and infamy, of being publicly tried and convicted for cruelly raping and brutally murdering an innocent 2 year old boy entrusted to his care.

Despite the hindsight criticism petitioner directs at counsel, their perception of the plea's *potential* to result in a standard range sentence can be traced back to storied precedent. It is

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precisely the strategy employed by the great Clarence Darrow in the infamous Leopold and Loeb case where at 18 and 19 two graduate students abducted, then murdered a 14 year old boy. To avoid death sentences, the defendants pleaded guilty.[3] As Darrow's recalled:

> From the beginning we never tried to anything but save the lives of the two defendants; we did not even claim [] they were insane.[4]

According to Darrow: "Of course the State and everyone else were taken by surprise," at the change of pleas, which authorized the court to impose sentences of death. *Id.* at 237. Yet Darrow's handling of that case exists in the cannon of our profession as bold strategy for securing more leniency than foreseeable after trial—*human reactions to child murder being what they are*. And that case was *relatively* less appalling than petitioner's case, for Leopold and Lobe killed a boy 12 years C.C.'s senior, they were not his caregiver and they did not rape him. Like Darrow, petitioner's counsel tried (albeit as unsuccessfully as Darrow) to preclude the State from presenting persuasive evidence of the crimes at sentencing. *Id.* at 238; Ex. 65 at 4-5. Civil defendants pursue like strategy when they admit liability to avoid condemnation predicted to exert upward pressure on damages. 30 Wash. Prac. Motions in Limine § 10:196 (2016-2017 ed.). Darrow likely saved Leopold and Lobe from the gallows. As petitioner's counsel likely saved him from a life sentence while ensuring his *shot* at the standard range. The choice of each defendant's sentencing judge is the difference between Darrow's success and the disappointment underlying petitioner's hindsight criticism of his counsel's performance. Yet, as exemplified by Darrow, counsel's strategy was drawn from a venerated-play book.

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[3] *See* Andie Tucher, Framing the Criminal: Trade Secrets of the Crime Reporter, 43 N.Y.L. Sch.L.Rev. 905, fn. 1-4 (2000)(citing Lobe, Leopold Tell How They Lured Boy into Car, Slew Him, Chicago Daily News, May 31, 1924; *see* generally Maureen McKernan, The Amazing Crime and Trial of Leopold and Lobe (1924); Marilyn Bardsley, Leopold & Lobe, in The Crime Library (1998) at, http://crimelibrary.com/loeb/loeb/loebmain. Htm; *See* Ed Lahey, Life for Slayers of Franks: Judge Scores Crime, Declares Boys Sane in "Mercy Sentence," Chicago Daily News, Sept. 10, 1924. The entire oration appears verbatim in McKernan, supra note 1, at 213-306; *See*, e.g., Great American Trials 311 (Edward W. Knappman ed., 1994); Hal Higdon, Leopold and Lobe: The Crime of the Century 298 (1999). The lead was reportedly pulled after one edition.

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It is irrefutable petitioner, his mother and counsel sought mercy by painting petitioner as answerable and remorseful with a self-sacrificing desire to spare the victim's family the further hardship of trial. Ex. 65 p. 41, 46-47; RP 159-65, 267-77, 1414-23, 1494-94. About four years earlier, our Supreme Court found the same approach to bear the mark of reasonable strategy:

> Elmore [] claims [] counsel's advice to plead guilty fell below the accepted standard for counsel in a death penalty case. Based on the experts' affidavits, he argues [] there was no advantage to him in pleading guilty and [] his attorney was advised to proceed to trial but unreasonably ignored that advice. []
>
> Elmore attempted to plead guilty at his first appearance. At all times thereafter he expressed a desire to spare his family from the publicity associated with a trial and a desire to take responsibility for his actions. Mr. Komorowski testified [] his strategy was built around the dual themes of remorse and taking responsibility. He did not want to do anything to detract from that strategy. As mentioned, Elmore gave a full, detailed confession and Mr. Komorowski testified [] he did not want the focus to be on the circumstances of the crime. Considering there was no viable defense to the charges, his defense theme, and his client's desire to plead guilty, we conclude that Mr. Komorowski's advice to plead guilty was based upon reasonable trial strategy.

In re Pers. Restraint of Elmore, 162 Wn.2d 236, 255, 172 P.3d 335 (2007). Identical strategy is discernable in Warner's argument:

> To use the word "tragedy" in this case demeans C[.C.]'s joys, gift of life. This case is a horrible confluence of youth, alcohol, drugs and everything you can put together to have this tragic, horrible result. []
>
> Is an exceptional sentence available to the court? Absolutely. Is it the appropriate sentence? No. The reason we believe it is not the appropriate sentence is that a standard range sentence—we are asking for a mid-range sentence on the Murder 1 count. That would be 300 months, approximately 25 years. Jake would be over 45 when he would even possibly become eligible for the possibility of parole. []
>
> When you look at Dr. Muscatel's report, we are talking about a, clearly, impulsive behavior. Addition is an impulsive behavior. He is drinking. He is underage. He is blacking out. He lost it, is how he phrased it to this court, when a little boy urinated on him. He remembers seeing a finger. [] There are no excuses, Your honor, but Mr. Musga does want to take responsibility. He didn't want to put the families through this. He has been dealing with it on a daily basis. His mother has seen a different Jake now that he is sober. It is the old Jake, the sober Jake. Any

[4] Clarence Darrow: *The Story of My Life*, 234, DA Capo Press (Ed. 1996).

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> family that deals with somebody that is addicted knows the difference between the addict and the sober individual. Jake will be sober. He will make progress.
>
> We would like the court to give him the opportunity to someday to show that he has learned from this horrific mistake. The way that the court could do that is to impose the standard range sentence and allow the Independent Sentence Review Board to review that. The court may not be on the bench [at] that point. I may not be alive at that point. [] We believe that Jake will make progress and will show that this was horribly wrong. He does understand the horrible impact this has had on all of the families.

RP (11/21) 42-46. *Perhaps* not Darrow, but not bad given the facts, and it conveyed the themes employed in ***Elmore***, *Leopold* and *Lobe*. The argument embraces the tragedy of what occurred to avoid offense. It answers the expectation for atonement with acceptance of responsibility while revealing a path to redemption. And it emphasizes the severity of the more merciful punishment, which must seem harsh enough to validate the claimed remorse as it preempts perception of falling too short of justice to strike the appropriate balance between retribution and rehabilitation. Petitioner carried the theme forward:

> I know [] there is no possible way to take back my actions that day. C[.C.] was an innocent life taken away [] I just want everyone to know how truly sorry I am. [] I accept full responsibility for my actions [] There is so much pain in my heart waking up and going through every day knowing what happened. It seems like a nightmare that never ends, and I know it must be worse for the family[].

Ex. 65 p. 41, 46-47. Support for the challenged findings can be found at:

> RP 111, 154-55, 159-65, 218, 221, 224-29, 233, 237-39, 246-53, 256, 258-64, 267-77, 269, 291-93, 297-99, 304, 334-43, 363-67, 391-92, 400-03, 411, 431-32, 436, 440-41, 474-75, 484-87, 501, 505-06, 510-13, 522-25, 530-34, 540, 542, 570-74, 580, 583, 587-88, 596-98, 601-02, 607, 629, 633, 637, 651-53, 676, 689, 690, 693-94, 702-03, 706, 839-40, 842, 849-50, 1378-79, 1398 1400-23, 1493-94,1503-09, 1529, 1540-41; Ex. 25, 29-30, 52-A, 53, 57, 62-65 (p.41), 46-47, 69 (p.13), 71, 85.

All of which leaves petitioner without facts to overcome his burden to prove deficient and prejudicial advice regarding his first degree murder plea.

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c. Factual findings on question No. 3: Petitioner's trial counsel adequately advised him regarding the direct consequences of his plea and that the facts admitted in his guilty plea empowered the court to impose an exceptional sentence above the standard range.

Courts are empowered to impose an exceptional sentence based on aggravating factors if a guilty plea admits facts that support them. ***State v. Steele***, 134 Wn.App. 844, 850-52, 142 P.3d (2006). Separate waivers are not required. *Id.* There is a strong interest in enforcing valid pleas. ***State v. Codiga***, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). Pleas are valid when entered by defendants who understand the charge(s) and their direct consequences. *Id.*; ***State v. Branch***, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Courts rely on the written statements contained in pleas where, as here, defendants acknowledge reading them and verify their accuracy. ***Codiga***, 162 Wn.2d at 923; ***In re Pers. Restraint of Keene***, 95 Wn.2d 203, 204-09, 622 P.2d 360 (1980); ***In re Pers. Restraint of Stoudmire***, 145 Wn.2d 258, 266, 36 P.3d 1005 (2001). Courts need not recite the charged elements or aggravating factors. *See Id.* When courts verify a plea's validity with oral inquiry, its presumed validity is "well nigh irrefutable." ***Branch***, 129 Wn.2d at 642.

Credible evidence proves petitioner was properly advised that his pleas empowered the court to impose an exceptional sentence above the standard range based on the aggravating circumstances charged in the original information. He never expressed confusion about it until confusion became a strategy for undoing his pleas. The reference hearing proved his relevant knowledge was first imparted by counsel. RP 226, 228, 233, 239, 246-50, 256, 258-64, 291-93, 297-99, 651-52, 686-87, 690-94, RP 1506-09, 1529, 1540-41; Ex. 6, 63-65, 69, 85. Later notice came from the State before the pleas. Ex. 6, 62 (p.4). That knowledge was verified through his statements to Muscatel and Sofia. RP 1507-08; 1529, 40-41; Ex. 85. Neither deficient nor prejudicial advice was proved.

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D. CONCLUSION

Uncontroverted evidence placed petitioner alone with C.C. when C.C. transformed from a healthy toddler into a raped and beaten corpse. Petitioner entered *factual* pleas to committing those crimes for the stated purpose of accepting responsibility and showing remorse as well as to spare the victim's family the ordeal of a trial. Over a year of litigation followed. It produced two more incriminating facts: (1) a medical examiner retained by counsel confidentially opined C.C.'s fatal and rectal injuries likely occurred during the period when petitioner was alone with him; and (2) petitioner verified disclosing his prior mistreatment of C.C. to a fellow inmate. Evidence of guilt does not need to be so certain to validate the entry of a plea, and:

> [e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice.

Hill, 474 U.S. at 58. The resources devoured by this PRP should prove a cautionary tale that weighs heavily against opening unreliable attacks to litigation. The PRP was based on:

> (1) self-serving accusations of the convicted inconsistent with statements he made in court, to police and pre-sentence interviewers; (2) claims of a biased mother without personal knowledge or understanding of many things she claimed, also directly contradicted by statements she made in court; (3) a private investigator who criticized counsel's investigation, but relied on facts provided to him by 3 bias witnesses (petitioner and his parents) but did not request affidavits from or interviews with counsel regarding their conduct and reasoning; and, lastly (4) a criminal defense attorney who reframed common defense arguments as expert opinions without knowledge of all counsels' conduct and reasoning; relying on filed documents that would not reveal the confidential information a professional opinion on effective assistance would require. The only opinion he was equipped to render was that he needed more information to render an opinion.

Expanding litigation permitted in this case to other cases, where pleas must be followed by what amounts to a full trial on attorney malpractice, would grid a system reliant on pleas to a halt. Petitioner's pleas were entered September 9, 2013. Years passed. A trial court was essentially commandeered for the better part of 3 months, not counting discovery litigation required by unfounded resistance to the waiver of attorney-client privilege inherent in the claims. Hundreds

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of pages have been written and read. More will follow. All the while C.C.'s family must endure new uncertainty about the future of what should have been a closed case as petitioner drags them through the mud with his counsel in an effort to turn back the clock, to claw back the trial he surrendered when he perceived himself as having far more to lose than he does now. It is an effort steeped in tragic irony given what he and his mother said to attain favorable consideration at sentencing:

> **Petitioner's Mother**: Jake has talked to me about this every day for months [] Jake is taking full responsibility for C[.C.]'s death. He is extremely remorseful and saddened by his actions. Jake could have gone to trial and maybe gotten off on a technicality [] but he didn't. He did not want any of us to go through the pain that a trial would have caused all the families.

Ex. 65 p. 41. But here we are, and so it goes. His failed PRP should be dismissed.

RESPECTFULLY SUBMITTED: March 27, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB #38725

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail to petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed at Tacoma, Washington, on the date below.

3-27-17 Kathleen Kalb
Date Signature

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SUPPLEMENTAL

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

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